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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1490 133

JACOB L. ZELLAN, *Petitioner,*

v.

HARRY P. GIDDINGS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

HARRY FRIEDMAN,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Jacob L. Zellan, respectfully prays that a writ of certiorari be issued by this court to review the decision of the United States Court of Appeals for the District of Columbia entered on March 24, 1947, which reversed a judgment of the District Court of the United States for the District of Columbia awarding the petitioner damages in the sum of $13,333.00. The United States Circuit Court of Appeals denied petitioner's petition for rehearing or in the alternative to affirm the judgment of the trial court on April 17, 1947.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is not yet reported but is set out in full in the record at page 103.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936 (28 U. S. C. A. 347(a)).

The decree of the United States Court of Appeals of the District of Columbia sought to be reviewed was filed March 24, 1947. A motion for rehearing or in the alternative to affirm the judgment of the trial court was seasonably filed, but denied by said court on April 17, 1947.

QUESTIONS PRESENTED.

1. May the United States Court of Appeals for the District of Columbia ignore the provisions of Federal Rules of Civil Procedure Nos. 46 and 51, and reverse the judgment of the trial court based on assignments of error concerning matters not submitted to the trial court prior to the jury bringing in its verdict? (Rule 51 incorporates Supreme Court Rule 8(1)).

2. May a defendant advise the trial court that an award of punitive damages is based on gross recklessness or gross carelessness and have the appellate court reverse an unfavorable decision against him because of a contrary contention after the trial?

3. Should a person driving an automobile negligently while voluntarily under the influence of intoxicating liquors be liable to punitive damages in addition to compensatory damages?

4. May punitive damages be awarded in an automobile negligence case occurring in the State of Maryland?

STATEMENT.

Petitioner was about to get into his automobile which was parked on a private parking place in the State of Maryland, in which his companion, one Hannah McKenney, had just entered when the respondent, Harry P. Giddings, operating his automobile while he was under the influence of intoxicating liquor (R. 51-58), ran into the petitioner and his automobile which was then standing in an open space without any other cars around it (R. 16, 17, 49), injuring him severely. The respondent, Harry P. Giddings, had been warned immediately prior to driving his automobile not to drive because of his drunken condition but he, nevertheless, drove it negligently, injuring the petitioner as aforesaid. (R. 54, 57, 58).

The petitioner and his companion, the said Hannah McKenney, filed a suit against the respondent which was tried in the District Court of the United States for the District of Columbia, and judgment was entered in behalf of petitioner in the sum of $13,333.00 and in behalf of the said Hannah McKenney in the sum of $500.00. The appeal was not prosecuted as to Hannah McKenney.

The petitioner requested the trial court to instruct the jury in detail as to the elements necessary to be found by them before punitive damages could be awarded. (R. 9, 84). This prayer was objected to by the respondent but no alternative prayer was offered by the respondent. (R. 84, 86-87).

The trial court took the position that if a man drives a car when he is obviously drunk and an accident happens while he is driving in such condition, punitive damages are in the discretion of the jury. (R. 80).

The court was advised by the respondent that some courts agreed with the court while others do not (R. 81), but the respondent did not point out to the court or contend at any time before the jury retired that the Maryland authorities held the negative of this question.

The respondent further advised the trial court that the basis of punitive damages is the gross recklessness or the gross carelessness with which an act is done. (R. 84).

Notwithstanding his objection to the petitioner's prayer was sustained, in his brief in the United States Court of Appeals for the District of Columbia, respondent complained that the trial court failed to give the substance of the petitioner's prayer. (Appellants Brief, page 11). At no time did the respondent offer any prayer covering the elements necessary to be proved before there could be an award of punitive damages.

In the trial court respondent took the position that in no negligence cases are punitive damages allowable. (R. 15). He contended such damages are limited to an action for assault. (R. 15).

The respondent at no time advised or contended in the trial court before the jury retired that punitive damages could not be awarded in the case because the events occurred in Maryland. Respondent made only a general objection to the trial court's charge on punitive damages. (R. 101). At no time did respondent point out to the trial court the specific grounds of his objections.

Before evidence in support of respondent's financial ability to pay punitive damages was offered or admitted, respondent was given three days in which to present authorities on the right to recover such damages, but none were submitted. (R. 52-53, 80-81).

The basis of the reversal by the Court of Appeals was the following charge by the trial court concerning the conditions under which the jury could in its discretion award punitive damages in addition to compensatory damages. (R. 99):

> "The Court is not expressing an opinion about this defendant's condition at the time of this accident, but the Court says to you that there is evidence in the case, if you believe it, that the defendant was drunk to the extent that he was staggering, that he was drunk to the extent his speech was confused, and if you believe

that to be true, if you believe that he operated his vehicle when he was in that condition, then, in your discretion, in addition to compensatory damages, you can award exemplary damages; that is, damages which will tend to deter him and other people from being guilty of like conduct."

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred as follows:

1. If there was error in the trial court, it was invited by the respondent, and the Court of Appeals is estopped to base its decision on such assignment of error.

2. In considering and basing its decision on matters not presented to the trial court prior to the jury retiring to consider its verdict.

3. In holding that driving an automobile negligently while drunk in Maryland does not sustain an award of punitive damages in the discretion of the jury.

4. In construing the decisions of the Supreme Court of Maryland to be that because a drunken driver of an automobile is liable to criminal prosecution under its statutes, an injured person may not recover punitive damages.

5. In limiting the definition of cases in which punitive damages may be recovered in Maryland to the situations cited by it instead of going to the basic decisions of Maryland which approve the language set forth by this Court.

REASONS FOR GRANTING THE WRIT.

1. The United States Court of Appeals for the District of Columbia has decided an important question of Federal law contrary to Federal Rules of Civil Procedure Nos. 46 and 51 which has not been, but should be settled by this Court.

A. The first two questions presented by this petition and the first two specifications of error raise the issue whether Rules 46 and 51 of the Federal Rules of Civil Procedure have the effect of barring the Court of Appeals for the District of Columbia from considering matters not specifically presented to the trial court before the jury retires to consider its verdict, particularly where the respondent misleads the trial court.

While this court has generally held that objections to the court's charge should be sufficiently specific to bring into focus the precise nature of the error, it had not ruled as to whether or not the wording of Rules 46 and 51 are a limitation on appellate's courts by which they are bound to ignore any assignment of error not specifically called to the attention of the trial court, unless there are exceptional circumstances as outlined in *Hormel* v. *Helvering*, 312 U. S. 552, 61 S. Ct. 719; 85 L. Ed. 1037.

The applicable portions of Rules 46 and 51 of Federal Rules of Civil Procedure are as follows:

> **Rule 46. "Exceptions Unnecessary.** * * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court *and his grounds therefor;* * * *" (Emphasis supplied).

> **Rule 51. "Instructions to Jury: Objection.** * * * *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating*

distinctly the matter to which he objects and the grounds of his objection * * *." (Emphasis supplied).

The necessity of proving "malice, or fraud, or evil intent" argued in the Court of Appeals by the respondent as being peculiarly applicable to Maryland, and which is the basis of the decision of the Court of Appeals was not presented to the trial court. On the contrary, the trial court was misled by the respondent when he advised it that the basis of punitive damages is the gross recklessness and the gross carelessness with which an act is done.

Petitioner in any event respectfully disagrees with the holding of the Court of Appeals that voluntarily driving an automobile negligently while drunk is not evidence of "malice" or "evil intent."

2. The decision below is in conflict with the decisions of other Circuit Courts of Appeals on the first two questions.

Practically all of the Circuit Courts of Appeals hold that Federal Rules of Civil Procedure Rules No. 46 and 51 which are usually considered together, are for the purpose of informing the trial judge of possible errors so that he may have an opportunity to consider his rulings and, if necessary, correct them. They require litigants to deal fairly and frankly with each other and the Court. The gist of the rules is that the Court and the opposing party must be made aware of the precise ground upon which the objector relies. *Tucker* v. *Loew's Theater & Realty Corp.* (2nd C. C. A. N. Y.), 149 F. 2d 677, and cases cited below.

A party may not sit by without specifically pointing out to the court the grounds of his objections and after verdict and judgment against him, when it is too late for the court to change its rulings or charge to the jury, complain on appeal about such rulings and charge of the court. In such instances a party waives his right to assign as error on appeal, grounds not called to the trial court's attention. See: *Century Furniture Company* v. *Bernhard's* (9th C. C. A. Calif.), 82 F. 2d 706; *Bowles* v. *Strickland* (5th C. C. A. Ga.),

151 F. 2d 419; *Andrews* v. *Hotel Sherman* (7th C. C. A. Ill.), 138 F. 2d 524; *Hershberger* v. *U. S.* (7th C. C. A. Ind.), 138 F. 2d 515; *Newman* v. *Clayton F. Sunny Co.* (2nd C. C. A. New York), 133 F. 2d 465; *Western Fire Insurance Co.* v. *Word* (5th C. C. A. Texas), 131 F. 2d 541; *Spann* v. *Commercial Standard Insurance Co.* (8th C. C. A. Ark), 82 F. 2d 593.

Litigation should stop somewhere. A defeated party should not be given another day in court simply because he failed to advise the trial court on a debatable point that was in existence at the time of the trial. And a victorious party should not be burdened with the retrial of a case because of a theory not submitted to the trial court. See *Helvering* v. *Rubinstein* (8th C. C. A.), 124 F. 2d 969.

3. The court below has decided a federal question of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision below in dealing with the first two questions constitutes a sharp departure from the generally accepted interpretation of court procedure even without reference to Federal Rules of Civil Procedure Nos. 46 and 51.

In the case of *Palmer* v. *Hoffman* (1943), 63 S. Ct. 477, 318 U. S. 109, Rehearing denied, 63 S. Ct., 757, 318 U. S. 800, 87 L. Ed. 1163, this court after stating that the trial court's charge to the jury may have been erroneous said:

> "Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

In the case at bar the trial court was not advised of the error assigned in and considered by the Court of Appeals. If the respondent had called the court's attention to these alleged errors, he might have obtained the correct charge or the question of punitive damages might have been eliminated from the case.

In *Noonan* v. *Caledonia Gold Mining Co.*, 121 U. S. 393, 30 L. Ed. 1061, 7 S. Ct. 911 (1877), this court said:

> "The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done."

Federal Rules 46 and 51 are merely a codification of the rules of practice that were already in existence at the time of their adoption.

Litigants should not mislead the trial court or keep quiet when it is their duty to speak. If they do so, then such conduct should bar them from presenting such questions to an appellate court, and the appellate court should be barred from considering such matters.

The case at bar has none of the exceptional circumstances which this court said justified the Circuit Court of Appeals in *Hormel* v. *Helvering, supra*, in reversing the action of the Board of Tax Appeals. In that case the appellate action was based on another decision of this Court governing the case which had not been handed down by this Court until after the action of the Board of Tax Appeals, but which was before the Circuit Court of Appeals and required a reversal in order to do justice.

In the case at bar it would be a gross injustice to require the petitioner to retry this case because the respondent either misled or kept quiet about the specific grounds of his

objections and waited to see if the outcome was satisfactory to him.

The Court will note that as to the co-plaintiff, Hannah McKenney, who recovered only $500.00, the outcome was satisfactory to the respondent, and he did not appeal from her judgment but paid it.

4. The United States Court of Appeals for the District of Columbia has decided a question of general importance which has not been but should be settled by this Court.

5. The court below has decided an important question of Maryland law in conflict with applicable decisions of the Supreme Court of Maryland, of this Court, and its own prior decision.

The third and fourth questions presented and the third, fourth, and fifth specifications of errors urged are related and will be discussed together.

The automobile is now probably our most common form of conveyance and when used reasonably and properly is a source of great comfort and convenience. However, the automobile is a dangerous instrumentality and requires constant vigilance on the part of its operator to prevent injury. *Griffiths* v. *Slaybough*, 58 App. D. C. 237, 29 F. 2d 437; *Story* v. *U. S.*, 57 App. D. C. 3, 16 F. 2d 342.

Where a person voluntarily imbibes in intoxicating beverages during the course of an evening and continues to operate such automobile after he has become intoxicated although warned not to do so, should he not be liable for punitive damages as a deterrent to himself and others?

In view of the tremendous number of fatal and other injuries caused by automobiles, it is believed that this court should make some statement on the question.

The United States Court of Appeals for the District of Columbia in *Nestlerode* v. *U. S.*, 74 U. S. App. D. C., 276, 122 F. 2d 56, sustained a conviction for murder in the second degree as a result of driving while drunk saying:

> "* * * Precisely what happened is what might have been expected as to the result of the events which appellant set in operation and is the natural and probable consequences of these acts. *Malice is presumed under such conditions.*" (Emphasis supplied)

But it would not apply this sound statement of the law to the case at bar.

There is a paucity of decisions involving punitive damages in driving while drunk cases. There are some decisions in those jurisdictions having "guest" statutes in which an operator of an automobile must be guilty of heedlessness or reckless disregard of rights of others or gross negligence before a passenger may recover compensatory damages. They hold that an operator driving negligently while intoxicated is driving in such manner, and recovery of compensatory damages are allowed. See *Dean* v. *Balduc*, 295 Mass. 451, 4 N. E. 2d 241 and *Scott* v. *Gardener*, 137 Tex. 628, 156 S. W. 2d 513.

CASE IN POINT.

There seems to be only one case, *Tomasik* v. *Lanferman*, 206 Wisc. 94, 238 N. W. 857, which rules squarely on whether or not a drunken driver shall be liable for punitive damages. The court there said:

> "We hold that the driving of a car upon our highways by one intoxicated fully responds to all the elements necessary to constitute gross negligence. One intoxicated is without proper control of all those faculties, the exercise of which is necessary to avoid danger to others while driving a car upon a public highway. *The driving of a car by one in such condition betrays an absence of any care, and indicates such recklessness and wantonness as evinces an utter disregard of consequences.*" (Emphasis supplied)

Wisconsin has a statute providing for comparative negligence. However, *Tomasik* v. *Lanferman*, *supra*, was not based on the statute. It was based on the vicious conduct of

a person driving an automobile while intoxicated without reference to the comparative negligence statute. Petitioner has been unable to find a drunken driving case that holds to the contrary.

MARYLAND AND UNITED STATES SUPREME COURT CASES.

The decision below states that it is based on a line of cases in Maryland beginning in 1884 and running through 1944 and leans very heavily on what the petitioner believes is dictum in the case of *Davis* v. *Gordon* (1944) 183 Md. 129, 36 A. 2d 699, 156 A. L. R. 1109, in which the driver of an automobile whose license had been previously revoked failed to stop after striking a pedestrian, notwithstanding he knew of the collision. The Supreme Court of Maryland in reversing the trial court because it had given a prayer on punitive damages, summed up the crux of the case in the following language:

> "The whole argument of the plaintiff was that, in addition to compensatory damages, he should collect additional damages, because the defendant did not stop as the statute requires and which imposes severe penalties for failure so to do. * * * The argument was that it showed the state of his mind at the time he struck Hydock. There were more impelling reasons than any civil liability, and they were the fear of arrest and possible imprisonment. There are many jurisdictions in which an instruction for punitive damages are (sic) granted more or less as a matter of course, but this court is not one of them."

In *Davis* v. *Gordon, supra,* the conduct relied on, as stated by the court, had nothing to do with the accident itself. It was conduct subsequent to the accident and not evidence of the conduct with which the injury was inflicted, and therefore there was no evidence from which the jury could find the necessary elements of conduct required to impose punitive damages. The conduct there had no bearing on the plaintiff's civil rights.

Apparently the Supreme Court of Maryland would have held punitive damages applicable had the driver of the automobile in *Davis* v. *Gordon, supra,* been drunk because in its opinion it said:

> **"There is no evidence from which it can be inferred that any of the parties concerned were under the influence of intoxicating liquor."**

The United States Court of Appeals for the District of Columbia in its opinion cites several cases all of which use somewhat different language in describing the conditions under which punitive damages are recoverable. However, all of these cases are based on the decisions of this court.

Beginning even prior to *P. W. & B. RR. Co.* v. *Larkin* (1877), 47 Md. 155, 162, and straight through to the present time, the Supreme Court of Maryland has followed the test for the recovery of punitive damages laid down by this court.

In *P. W. & B. RR. Co.* v. *Larkin, supra,* the Supreme Court of Maryland approved the language of this court in *Milwaukee & St. Paul Ry. Co.* v. *Arms,* 91 U. S. 489, 493, which holds that exemplary damages are:

> "* * * equally applicable to the suits for personal injuries received through the negligence of others * * *" if the wrongful act "* * * was done wilfully, or was the result of that *reckless indifference to the rights of others,* which is equivalent to an intentional violation of them. In that case the jury is authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive and on this rests the rule of exemplary damages." (Emphasis supplied)

In adopting the above doctrine the Supreme Court of Maryland in that case said:

> **"This seems to us to place the law on this subject upon safe and satisfactory grounds * * *."**

There is nothing in the later cases, either in the Supreme Court of Maryland or this court, that departs from this ground. In fact the case of *Phila., Wilm. & Balt. R. R.* v. *Hoefleich,* 62 Md. 300 (1884), cited by the lower court as supporting its decision, refers at page 308 to the case of *Milwaukee & St. Paul Ry. Co.* v. *Arms, supra,* and quotes most of the language set forth in the above quotation.

It is true that the various decisions of Maryland use different language at various times such as "criminal indifference to civil obligations," "fraud, or malice, or evil intent, or oppression" and "utter disregard of plaintiff's rights" in discussing punitive damages, but that is the usual difference that courts use in discussing a situation and does not delimit the test laid down by this court. In *Milwaukee & St. Paul Ry. Co.* v. *Arms, supra,* this court at pages 493 and 494 took note of the difficulty of courts in defining specifically the elements necessary for the recovery of punitive damages and their use of different language at various times describing the same basic situation. This court has approved language similar to that used in *Milwaukee and St. Paul Ry. Co.* v. *Arms, supra,* beginning with *The Amiable Nancy,* 3 Wheat 546 though *Day* v. *Woodworth,* 13 How. 363, 371; *Phila. etc. R. R. Co.* v. *Quigley,* 21 How. 202, 214; *Missouri Pacific Ry. Co.* v. *Humes,* 115 U. S. 512, 521; *Barry* v. *Edmunds,* 116 U. S. 550, 562; *Denver, etc.* v. *Harris,* 122 U. S. 597, 609; *Lake Shore & M. S. Ry. Co.* v. *Prentice,* 147 U. S. 101, and continuing up to the present time.

The type of conduct justifying punitive damages was considered in **The Restatement of the Law of Torts,** and is set forth as follows:

> Section 501: Comment b. "The extent of liability, as well as the existence thereof, may be affected by the fact that the actor's conduct is reckless rather than negligent. Thus, the jury may be permitted to impose punitive damages upon a reckless defendant although only compensatory damages would be permissible if the defendant had been merely negligent. * * *"

Section 500: Comment c. "In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort."

Section 908: Comment b. "Punitive damages are awarded only for outrageous conduct, that is for acts done with a bad motive or with a reckless indifference to the interests of others."

Section 908: Comment d. "* * * The excessiveness of punitive damages in a case where they are allowable is not ground for reversal or for a new trial unless the award is so great as to indicate that the jury was actuated by passion or prejudice."

The conduct of respondent in driving negligently while drunk appears to meet the tests for punitive damages described by this court, the Supreme Court of Maryland, and The Restatement of the Law of Torts. Further, malice was shown by the lower court's test as set forth in *Nestlerode* v. *U. S. supra.*

Certainly the fact that the conduct of the respondent in driving negligently while drunk is punishable by a criminal statute should not preclude an injured person from recovering punitive damages. Such a strained interpretation has been placed on *Davis* v. *Gordon, supra,* by the lower Court.

CONCLUSION.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this court, and that the decision of the United States Court of Appeals for the District of Columbia was erroneous.

JACOB L. ZELLAN,
Petitioner.

By HARRY FRIEDMAN,
Attorney for Petitioner.